FILE COPY

FILED

MAY 26 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~1616~~ 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM H. DEMPSEY, JR.
DAVID BOOTH BEERS
734 Fifteenth Street, N.W.
Washington, D. C. 20005

RICHARD M. FREEMAN
JAMES P. DALEY
ROBERT SCHMIEGE
400 West Madison Street
Chicago, Illinois 60606

Attorneys for Chicago and North Western Railway Company

Of Counsel:

SHEA AND GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

Opinions
Jurisdictio
Question
Statutory
Statement
Reasons f
Conclusion

Appendice
A—Opinio
B—Judgm
C—Findin
ment

CASES:

Akron & L
Supp.
(D.C.
American
F. Su
Atlantic C
262 F
225 (
Brotherho
A. R.
Brotherho
385 F
Brotherho
383 F
Brotherho
353 U

INDEX

	Page
elow	1
	2
resented	2
Provisions Involved	2
	4
Granting the Writ	7
	35
:	
of Court of Appeals, March 6, 1970	1a
nt of Court of Appeals, March 6, 1970	21a
s of Fact, Conclusions of Law, and Judg- District Court	22a

CITATIONS

B. R.R. v. *Order of Ry. Conductors*, 253 F. 38 (D. D.C. 1966), *modified*, 385 F.2d 581 ir. 1967)	12
irlines, Inc. v. *Air Line Pilots Ass'n*, 169 . 777 (S.D.N.Y. 1958)	15
L. R.R. v. *Brotherhood of R.R. Trainmen*, Supp. 177 (D. D.C.), *reversed*, 383 F.2d C. Cir. 1967)	5, 13
l of Locomotive Fire. & Eng. v. *Bangor &* , 380 F.2d 570 (D.C. Cir. 1967)	9
l of R.R. Trainmen v. *Akron & B.B. R.R.*, d 581 (D.C. Cir. 1967)	9, 11, 12, 27
l of R.R. Trainmen v. *Atlantic C.L. R.R.*, d 225 (D.C. Cir. 1967)	13, 26
l of R.R. Trainmen v. *Chicago R. & I. R.R.*, . 30 (1957)	8

Page

Brotherhood of R.R. Trainmen v. *Jacksonville Terminal Co.*, 394 U.S. 369 (1969) 7, 9, 25
Brotherhood of R.R. Trainmen v. *Toledo, P. & W. R.R.*, 321 U.S. 50 (1944) 21, 25
Brotherhood of Ry. Clerks v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650 (1965) 22
Brotherhood of Ry. Clerks v. *Atlantic C.L. R.R.*, 201 F.2d 36 (4th Cir. 1953) 5, 10
Brotherhood of Ry. Clerks v. *Pan American World Airways, Inc.*, 404 F.2d 938 (2d Cir. 1969) 27
Brotherhood of Ry. Clerks v. *Railroad Ret. Bd.*, 239 F.2d 37 (D.C. Cir. 1956) 12, 27
Capitol Airways, Inc v. *Air Line Pilots Ass'n*, 41 CCH Lab Cas. ¶ 16,739 (M.D. Tenn. 1961) 17
Chicago, B. & Q. R.R. v. *Railway Employes' Dept.*, 301 F. Supp. 603 (D. D.C. 1969) 13, 14
Chicago, R.I. & P. R.R. v. *Switchmen's Union*, 187 F. Supp. 581 (W.D.N.Y. 1960), *rev'd*, 292 F.2d 61 (2d Cir. 1961) 15, 29
Chicago, R.I. & P. R.R. v. *Switchmen's Union*, 292 F.2d 61 (2d Cir. 1961) 14, 26, 27
Detroit & T.S.L. R.R. v. *United Transportation Union*, 396 U.S. 142 (1969) 6, 9, 27
Elgin, J. & E. R.R. v. *Burley*, 325 U.S. 711 (1945), *adhered to on rehearing*, 327 U.S. 661 (1946) ..8, 16, 21, 22, 23, 24
Flight Eng'rs Int'l Ass'n v. *Trans World Airlines, Inc.*, 305 F.2d 675 (8th Cir. 1962) 17
General Committee v. *Missouri-K.-T. R.R.*, 320 U.S. 323 (1943) 21, 23, 24, 33
International Ass'n of Machinists v. *NMB*, — F.2d —, 62 CCH Lab. Cas. ¶ 10,621 (D.C. Cir. 1970) 32
International Ass'n of Machinists v. *National Ry. Lab. Conference*, 62 CCH Lab. Cas. ¶ 10,702 (D. D.C. 1970) 13, 14
International Ass'n of Machinists v. *Street*, 367 U.S. 740 (1961) 22
Kennedy v. *Long Island R.R.*, 211 F. Supp. 478 (S.D. N.Y. 1962) *aff'd*, 319 F.2d 366 (2d Cir. 1963) 15, 27
Kennedy v. *Long Island R.R.*, 319 F.2d 366 (2d Cir. 1963) 14
KLM Royal Dutch Airlines v. *Transport Workers*, 49 CCH Lab. Cas. ¶ 18,990 (E.D.N.Y. 1964) 15, 16

Page

Long Island R.R. v. *Brotherhood of R.R. Trainmen*, 185 F. Supp. 356 (E.D.N.Y. 1960) 15

Long Island R.R. v. *International Bro. of Teamsters*, 57 CCH Lab. Cas. ¶ 12,378 (E.D.N.Y. 1967) 15

Long Island R.R. v. *System Federation*, 368 F.2d 50 (2d Cir. 1966) 15

National Airlines, Inc. v. *International Ass'n of Machinists*, 416 F.2d 998 (5th Cir. 1969) 17

NLRB v. *General Electric Co.*, 418 F.2d 736 (2d Cir. 1969) 6

NLRB v. *Insurance Agents Int'l Union*, 361 U.S. 477 (1960) 6

NLRB v. *Truitt Mfg. Co.*, 351 U.S. 149 (1956) 6

Norfolk & P.B.L. R.R. v *Brotherhood of R.R. Trainmen*, 248 F.2d 34 (4th Cir. 1957) 9, 10

Northwest Airlines, Inc. v. *Airline Pilots Ass'n*, 185 F. Supp. 77 (D. Minn. 1960) 17

Order of R.R. Telegraphers v. *Chicago & N.W. Ry.*, 362 U.S. 330 (1960) 22

Pan American World Airways, Inc. v. *Brotherhood of Ry. Clerks*, 185 F. Supp. 350 (E.D.N.Y. 1960) ...15, 16

Pan American World Airways, Inc. v. *Flight Eng'rs Int'l Ass'n*, 306 F.2d 840 (2d Cir. 1962) 14, 15, 27

Pan American World Airways, Inc. v. *International Bro. of Teamsters*, 275 F. Supp. 986 (S.D.N.Y. 1967, *aff'd on basis of opinion below sub nom. Brotherhood of Ry. Clerks* v. *Pan American World Airways Inc.*, 404 F.2d 938 (2d Cir. 1969) 27

Pennsylvania R.R. System Federation v. *Pennsylvania R.R.*, 267 U.S. 203 (1925) 18

Piedmont Aviation, Inc. v. *Air Line Pilots Ass'n*, 416 F.2d 633 (4th Cir. 1969) 6, 7, 8, 9, 10, 11, 27

Pullman Co. v. *Order of Ry. Conductors*, 316 F.2d 556 (7th Cir. 1963) 5

Richardson v. *Texas & N.O. R.R.*, 242 F.2d 230 (5th Cir. 1957) 16

Seaboard World Airlines, Inc. v. *Transport Workers*, — F.2d —, 62 CCH Lab. Cas. ¶ 10,759 (2d Cir. 1970) 14, 27

Southern Ry. v. *Brotherhood of Locomotive Fire. & Eng.*, 223 F. Supp. 296 (M.D. Ga. 1962), *aff'd on basis of opinion below*, 324 F.2d 503 (5th Cir. 1963) 11, 17

Page

Southern Ry. v. *Brotherhood of Locomotive Fire. & Eng.*, 384 F.2d 323 (D.C. Cir. 1967) 13
Stark v. *Wickard*, 321 U.S. 288 (1944) 22, 25
Steele v. *Louisville & N. R.R.*, 323 U.S. 192 (1944) ...22, 25
Switchmen's Union v. *NMB*, 320 U.S. 297 (1943) ..21, 22, 25
Texas & N.O. R.R. v. *Brotherhood of Ry. Clerks*, 281 U.S. 548 (1930) 19, 30
Tunstall v. *Brotherhood of Locomotive Fire. & Eng.*, 323 U.S. 210 (1944) 22, 25
United Industrial Workers v. *Galveston Wharves*, 400 F.2d 320 (5th Cir. 1968) 16
United Steelworkers v. *NLRB*, 390 F.2d 846 (D.C. Cir. 1967) 5
Virginian Ry. v. *System Federation*, 84 F.2d 641 (4th Cir. 1936), *aff'd*, 300 U.S. 515 (1937) 10
Virginian Ry. v. *System Federation*, 300 U.S. 515 (1937) 7-8, 11, 13, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27

STATUTES:

Labor Management Relations Act (29 U.S.C. §§ 151 ff.) 10
Norris-LaGuardia Act § 8 (29 U.S.C. § 108) 9, 25
Railway Labor Act:
§ 2 First (45 U.S.C. § 152 First) .....passim
§ 2 Second (45 U.S.C. § 152 Second) 18, 23, 24
§ 2 Fourth (45 U.S.C. § 152 Fourth) 23
§ 2 Ninth (45 U.S.C. § 152 Ninth) 10, 18, 23, 24
§ 5 First (45 U.S.C. § 155 First) 2, 3, 5, 30, 31
§ 6 (45 U.S.C. § 156) 4, 31
§ 10 (45 U.S.C. §160) 5
Transportation Act of 1920 § 301 (41 Stat. 456, 469) ..18, 19
28 U.S.C. § 1254(1) 2

MISCELLANEOUS: Page

Cox, "The Duty to Bargain in Good Faith," 71 *Harv. L. Rev.* 1401 (1958) 22

Gamser, "The Role of Mediation in Airline Labor Disputes," "Symposium on Air Transport Labor Relations," 35 *J. Air. L. & C.* 313 (1969) 29

Highsaw, "The Need for Re-evaluation of Labor Legislation," "Symposium on Air Transport Labor Relations," 35 *J. Air L. & C.* 313 (1969) 22-23

Meltzer, "The Chicago & North Western Case: Judicial Workmanship and Collective Bargaining," 1960 Supreme Court Review 113 22

National Mediation Board Annual Reports:

Seventh Annual Report (1941) 28

Sixteenth Annual Report (1950) 28

Nineteenth Annual Report (1953) 28

Twenty-Fourth Annual Report (1958) 28

Twenty-Fifth Annual Report (1959) 28

Twenty-Sixth Annual Report (1960) 28

Twenty-Seventh Annual Report (1961) 28

Note, 59 *Mich. L. Rev.* 459 (1961) 22

"Railroad Labor Disputes," *Hearings before House Committee on Interstate and Foreign Commerce on H.R. 7180,* 69th Cong., 1st Sess. (1926) 26, 31, 32

"Railway Labor Act," *Hearings before the Senate Committee on Interstate Commerce on S. 2306,* 69th Cong., 1st Sess. (1926) 31, 32, 33

Smith, "The Evolution of the 'Duty to Bargain' Concept in American Law," 39 *Mich. L. Rev.* 1065 (1941) 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No.

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on March 6, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals is set forth in Appendix A hereto (pp. 1a-20a *infra*), and the findings of fact, conclusions of law, and judgment of the District Court in Appendix C (pp. 22a-29a *infra*).

The decision of the District Court is not reported, but the Court of Appeals opinion is officially reported at 422 F.2d 979.

JURISDICTION

The judgment of the Court of Appeals, set forth in Appendix B hereto (p. 21a *infra*), was entered on March 6, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

In this case, petitioner railroad sought an injunction against a strike by respondent union on the ground that, during the negotiations between the parties, the union had not complied with Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First), which requires carriers and unions "to exert every reasonable effort to make and maintain agreements." The question presented in this petition is whether the federal courts have jurisdiction to entertain such a claim, or whether instead such jurisdiction is committed by the Act exclusively to the National Mediation Board.

STATUTORY PROVISIONS INVOLVED

The statutory provisions principally involved are Sections 2 First and 5 First of the Railway Labor Act, which provide as follows:

Section 2 First (45 U.S.C. § 152 First):

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to

the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 5 First (45 U.S.C. § 155 First):

"The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

"In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

"If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change

shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose."

STATEMENT

This case arose when petitioner, the Chicago & North Western Railway Company (hereinafter the "C&NW"), sued to obtain an injunction against a strike threatened by respondent, the United Transportation Union (hereinafter the "UTU"). The basis for the C&NW's suit was its claim that the UTU had not complied with the command of Section 2 First of the Railway Labor Act (45 U.S.C. § 152 First) to "exert every reasonable effort" to resolve its dispute with the C&NW. Neither the District Court nor the Court of Appeals reached the merits of the C&NW's claim, for both held that violations of Section 2 First are remediable exclusively by the National Mediation Board and that therefore the C&NW's claim fell outside the jurisdiction of the federal courts. The sole issue presented in this petition is whether that holding is correct. The relevant facts are as follows:

The labor dispute between the C&NW and the UTU that led to the strike threat, and hence to the litigation, concerns how many brakemen should be employed on the C&NW's trains—the so-called "crew consist" controversy. In 1965 the C&NW and UTU exchanged bargaining notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) proposing changes in their existing agreements on that subject. The formal procedures of the Railway Labor Act were exhausted with respect to these notices on November 16, 1969. That is, by that date:

> "... the parties had held conferences pursuant to § 6 (45 U.S.C. § 156); the National Mediation

Board had mediated the dispute after invocation of mediation pursuant to § 5 (45 U.S.C. § 155); the Board, pursuant to § 5, had concluded that its efforts had been unsuccessful and had proffered arbitration; the Railway had accepted that proffer but the Union declined; the Board thereupon, on October 16, 1969, had terminated its services pursuant to § 5. The President had not appointed an Emergency Board under § 10 (45 U.S.C. § 160); and the § 5 thirty day 'cooling off' period respecting maintenance of the status quo had expired." (CA Op. *infra* pp. 4a-6a, footnotes omitted).

On November 19, 1969 the C&NW instituted this suit in the United States District Court for the Northern District of Illinois seeking an injunction against a threatened strike by the UTU. The C&NW alleged that, although the formal procedures of the Act had been exhausted, the UTU had not discharged its obligations under that statute in that it had not exerted "every reasonable effort" to settle the dispute as required by Section 2 First (45 U.S.C. § 152 First) (CA Op. *infra* p. 6a). The District Court granted a temporary restraining order and then held a hearing on the C&NW's motion for a preliminary injunction at which C&NW witnesses testified at length.[1] At the conclusion of the C&NW's case, the District Court

[1] Since the character of that testimony is not relevant here, and since it is very extensive, we shall not attempt to summarize it. By way of example, however, a part of the C&NW's testimony would have supported—we think compelled—a finding that the UTU breached its statutory bargaining duties in the following respects: (1) it refused to bargain at all over the C&NW's initial proposals and subsequent compromise proposals (see *Brotherhood of Ry. Clerks* v. *Atlantic C.L. R.R.*, 201 F.2d 36, 39 (4th Cir. 1953); *United Steelworkers* v. *NLRB*, 390 F.2d 846 (D.C. Cir. 1967); *Pullman Co.* v. *Order of Ry. Conductors*, 316 F.2d 556, 563 (7th Cir. 1963); *Atlantic C.L. R.R.* v. *Brotherhood of R.R. Trainmen*,

granted the UTU's motion to dismiss on the ground that the National Mediation Board has exclusive jurisdiction to decide claims under Section 2 First (DC Conclusions 2 and 3, *infra* pp. 26a-27a). At the same time, however, "recognizing that there was case law contrary to its decision," the District Court granted the C&NW an injunction pending appeal (CA Op. *infra* p. 7a).

The C&NW appealed from the dismissal of its complaint, and the UTU appealed from the order granting the injunction pending appeal. The Court of Appeals affirmed the District Court on both counts. As to the C&NW's appeal, the Court concluded that "§ 2, First does not contemplate judicial enforcement of its 'reasonable effort' requirement." Rather, the "role of the [National] Mediation Board requires it and not the judiciary to enforce compliance with § 2, First." The Court, while noting this Court's statement in *Detroit & T. S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 158 (1969), that "the Mediation Board has no adjudicatory authority with regard to major disputes," and saying that it was "mindful that the role of the Mediation Board is basically a nonadjudicatory one," nevertheless held that "the Mediation Board must accept . . . a limited 'quasi adjudicatory'

---

262 F. Supp. 177, 183 (D. D.C.), *reversed on other grounds*, 383 F.2d 225 (D.C. Cir. 1967)); (2) it barred by convention action its negotiators from even discussing one of the C&NW's proposals (see *Piedmont Aviation, Inc.* v. *Air Lines Pilots Ass'n*, 416 F.2d 633 (4th Cir. 1969)); and (3) it adopted a "predetermined resolve not to budge from [its] initial position" (*NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 154 (1956)) and maintained from the start "an attitude of 'take-it-or-leave-it' " (*NLRB* v. *Insurance Agents Int'l Union*, 361 U.S. 477, 485 (1960)); see also *NLRB* v. *General Electric Co.*, 418 F.2d 736, 756-63 (2d Cir. 1969)).

posture" respecting Section 2 First issues. The Court acknowledged that in *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n,* 416 F.2d 633 (1969), *cert. denied,* 25 L.Ed. 2d 105 (1970), the Court of Appeals for the Fourth Circuit had rendered "a holding opposite to our conclusion," but said that it could "not agree with the Fourth Circuit decision" (CA Op. *infra* pp. 13a, 16a-17a, 19a). On the C&NW's application, the Court of Appeals stayed its mandate—thereby leaving the District Court's strike injunction pending appeal in effect—until the disposition of this petition for certiorari.

REASONS FOR GRANTING THE WRIT

The question whether Section 2 First, which this Court has referred to as the "heart" of the Railway Labor Act,[2] imposes judicially enforceable obligations is plainly important, since those obligations come into play in every negotiation conducted pursuant to the Act. So is the collateral question whether the National Mediation Board has the authority and the obligation to decide whether the parties to a negotiation have complied with Section 2 First. As to both questions, the holding of the lower court raises conflicts among decisions on a broad scale. As the lower court conceded, its decision is directly at odds with a recent decision by the Fourth Circuit Court of Appeals. While the lower court did not mention it, its decision is also in conflict with the rule established by three other Courts of Appeals. And while the lower court denied it, its decision conflicts with this Court's decision in *Virginian*

---

[2] *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 377 (1969).

Ry. v. *System Federation,* 300 U.S. 515 (1937). Moreover, the lower court's decision would require the National Mediation Board to assume a responsibility that the Board has never exercised, that the Congress did not mean it to have, and that is incompatible with the performance of the Board's central statutory role as a mediatory agency.

1. As to the justiciability of Section 2 First, we begin with the conflict among lower courts rather than with this Court's holding in *Virginian* because, while the Court of Appeals thought its decision reconcilable with *Virginian,* it conceded that its decision was squarely contrary to the ruling of the Fourth Circuit Court of Appeals in *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n,* 416 F.2d 633 (1969), *cert. denied,* 25 L.Ed. 2d 105 (1970).[3]

In *Piedmont,* as in the case at bar, the dispute between the union and the carrier was a "major dispute"—that is, it was a disagreement over proposals to change existing contracts rather than a "minor" dispute over the interpretation of those contracts.[4] While "minor" disputes are subject to compulsory arbitration and may not be the occasion for strikes or lockouts,[5] such "self help" in a "major" dispute is permissible, but only when there has been compliance with all the provisions of the Railway Labor Act relating to

---

[3] On May 18, 1970 this Court denied a motion for leave to file an out-of-time petition for rehearing in *Piedmont.* 38 U.S. Law Week 3454 (1970).

[4] See, generally, *Elgin, J. & E. R.R.* v. *Burley,* 325 U.S. 711, 722-28 (1945), *adhered to on rehearing,* 327 U.S. 661 (1946).

[5] See *Brotherhood of R.R. Trainmen* v. *Chicago R. & I. R.R.,* 353 U.S. 30 (1957).

such disputes.[6] In *Piedmont,* as in the case at bar, the formal procedures of the Act—conferences, mediation, and expiration of the relevant "cooling off" periods—had been exhausted, but the carrier sought a strike injunction on the ground that the requirements of the Act had not been met in that the union had failed to "exert every reasonable effort" to resolve the dispute within the meaning of Section 2 First.

The District Court in *Piedmont* granted a preliminary injunction because "the union failed to negotiate in good faith as required by the . . . Act." 416 F.2d at 637. The Court of Appeals affirmed. With respect to the enforceability of Section 2 First, as the Seventh Circuit Court of Appeals noted in the case at bar (CA Op. *infra* p. 19a), the Fourth Circuit Court of Appeals in *Piedmont* explained:

> "Restraining the parties from self-help, through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the congressional purpose of providing machinery to prevent strikes without creating an irreconcilable conflict with the Norris-LaGuardia Act. Restraint conditioned in this respect does not deny the right to strike over a major dispute; but it delays this right until the union satisfies the mandate of the Railway Labor Act." *Id.,* at 636.

---

[6] See, *e.g., Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 378, 384-85 (1969); *Detroit & T. S.L. R.R.* v. *United Transportation Union,* 396 U.S. 142, 150-53 (1969); *Norfolk & P.B.L. R.R.* v. *Brotherhood of R.R. Trainmen,* 248 F.2d 34, 45-46 (4th Cir. 1957); *Brotherhood of Locomotive Fire & Eng.* v. *Bangor & A. R.R.,* 380 F.2d 570, 583 (D.C. Cir. 1967); *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.,* 385 F.2d 581, 613 (D.C. Cir. 1967).

This ruling was in accord with previous decisions by the Fourth Circuit Court of Appeals. Thus, in *Virginian Ry.* v. *System Federation,* 84 F.2d 641 (1936) —the decision affirmed by this Court in the opinion we discuss in detail later—the Court of Appeals upheld the validity of an injunction against a carrier which, *inter alia,* ordered it to comply with its Section 2 First obligations. Later, in *Brotherhood of Ry. Clerks* v. *Atlantic C.L. R.R.,* 201 F.2d 36 (1953), the Court of Appeals directed the grant of injunctive relief compelling the carrier to bargain with the union after the National Mediation Board had released the case and all formal procedures of the Act had been exhausted. The Court cited Sections 2 First and 2 Ninth, together with this Court's decision in *Virginian,* and stated:

> "It was the duty of the railroad under this statute to bargain in good faith with the brotherhood. ... An employer who assumes an intransigent attitude in refusing to bargain collectively manifestly does not meet the requirements of the statute merely because he listens politely to an offer and exercises politeness in declining it without making any counter offer or indicating any basis upon which he is willing to bargain. . . ." *Id.,* at 39-40.[7]

On February 24, 1970, this Court denied certiorari in *Piedmont.* 25 L.Ed. 2d 105. Ten days later, the Court of Appeals in the case at bar rejected the *Pied-*

---

[7] See also *Norfolk & P.B.L. R.R.* v. *Brotherhood of R.R. Trainmen,* 248 F.2d 34, 45 n.6 (4th Cir. 1957), where in upholding a carrier's right to a strike injunction, the court in *dictum* suggested that the union's bargaining may not have "satisf[ied] the substantive requirement of negotiation imposed upon the Brotherhoods by the Act" and stated that the "negotiation required by the Act is the same 'good faith' bargaining required by the Labor Management Relations Act. . . ."

mont rule, thereby raising a conflict between circuits that only this Court can resolve.

2. The decision below conflicts not only with *Piedmont*, but also with decisions of the Courts of Appeals for the District of Columbia, Second, and Fifth Circuits. Outside the Seventh Circuit, "[T]he courts have enjoined . . . threatened and impending strikes in major disputes where good faith bargaining has not taken place in the manner and to the extent required by the Act . . . ." *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.*, 223 F. Supp. 296, 305 (M.D. Ga. 1962), *aff'd on basis of opinion below*, 324 F.2d 503 (5th Cir. 1963).

a. The justiciability of Section 2 First is well established by a series of decisions in the District of Columbia Circuit. In *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581 (1967), which involved a number of rather complex issues, the District Court had made the following determinations respecting the obligation to bargain in "good faith": that one set of union contract proposals was premature because served prior to the expiration of a controlling arbitration award; that the conferences held respecting those proposals, at which the carriers did not discuss the merits but instead properly insisted that the notices were premature, did not satisfy the Act's requirements respecting bargaining; and that the union was obliged to satisfy that requirement for conferences before it could call upon the Mediation Board to undertake mediation. The District Court said:

> "Under the Railway Labor Act, as it has been construed by the Supreme Court in Virginian Railway Co. v. System Federation No. 40, Railway Employees, 300 U.S. 515 . . . there is a binding

obligation on the part of both parties to conduct negotiations in good faith pursuant to notices served under Section 6 of the Railway Labor Act. The Supreme Court made it clear that the provision for negotiations was not merely an expression of a pious wish, was not hortatory, but was a command.

"There must be a *bona fide* actual negotiation, and the courts will, by appropriate decrees, require negotiations." *Akron & B.B. R.R.* v. *Order of Ry. Conductors,* 253 F. Supp. 538, 539-540 (1966).

The Court of Appeals not only affirmed that determination, upholding a restraining order against a strike (385 F.2d at 598, 614), but also held that with respect to different union notices found not to be premature the carriers had "breached their duty to enter negotiations in good faith" by refusing to discuss the merits of those proposals (385 F.2d at 597-98). Under the Seventh Circuit's view, those determinations could not have been made; they would have been within the exclusive jurisdiction of the National Mediation Board, which had actually undertaken mediation with respect to a number of the notices in question (385 F.2d at 597, 598).

Three other District of Columbia Court of Appeals decisions are in accord with *Akron.* Prior to that case, the Court of Appeals had affirmed a determination by the Railroad Retirement Board that a strike had "violated Section 2, First of the Railway Labor Act" and that therefore the striking employees were not entitled to unemployment benefits. *Brotherhood of Ry. Clerks* v. *Railroad Ret. Bd.,* 239 F.2d 37, 43-44 (1956). At about the same time as *Akron,* the Court of Appeals refused to set aside pending appeal the portion of an

injunction requiring a carrier to "exert every reasonable effort" to resolve its "major" dispute with a union, citing *Virginian* and stating: "The Supreme Court has held that a federal court may issue an injunction to compel compliance by the employer with the requirements of § 2 First." *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.*, 384 F.2d 323, 328 (1967). And finally, in a strike injunction context, after exhaustion of all formal procedures of the Act, the Court of Appeals, while reversing the District Court's determination that the union had violated Section 2 First by refusing to engage in multi-employer bargaining, laid down the rule that a court must decide "[w]hat constitutes good faith bargaining in the railroad industry . . . on an issue-by-issue evaluation" of the relevant facts. *Brotherhood of R.R. Trainmen* v. *Atlantic C.L. R.R.*, 383 F.2d 225, 229 (1967).[8]

In two recent cases, moreover, the United States District Court for the District of Columbia, guided by the Court of Appeals opinion in *Atlantic Coast Line,* issued strike injunctions after exhaustion of the formal procedures of the Act upon the basis of holdings that the unions had violated their statutory obligations respecting multi-employer bargaining. *Chicago, B. & Q. R.R.* v. *Railway Employes' Dept.*, 301 F. Supp. 603 (1969); *International Ass'n of Machinists* v. *National Ry. Lab. Conference,* 62 CCH Lab. Cas. ¶ 10,702 (1970). In the latter case, for example, the Court held that "[b]y initiating and negotiating the dispute on an obligatory national basis and then striking the carriers

[8] In issuing the strike injunction, the District Court had discussed the content of the "good faith bargaining" rule and had cited *Virginian* for the principle that "a fulfillment of this obligation may be compelled by judicial decree." *Atlantic C. L. R.R. v. Brotherhood of R. R. Trainmen,* 262 F. Supp. 177, 184 (1967).

on an individual basis it seems clear that the unions have violated their [Section 2 First] duty to 'exer every reasonable effort to make . . . agreements . . and settle disputes.' " (Ellipses by the Court.) 6 CCH Lab. Cas. at p. 18,313.[9]

b. The Court of Appeals for the Second Circuit ha also held Section 2 First to be enforceable by injunc tion. Its most recent decision is *Seaboard World Air lines, Inc.* v. *Transport Workers,* —— F. 2d ——, 6 CCH Lab. Cas. ¶ 10,759 (1970). There the court hel that a strike called to press bargaining demands in "major" dispute in violation of a valid contractua moratorium on such demands would violate Section First, and that accordingly a strike should be enjoine pending the district court's determination of the va lidity of the contractual moratorium. Three earlie decisions by the Court of Appeals are in accord.[10] I the first, the Court rejected a carrier's Section 2 Firs claim on the merits, *Pan American World Airway Inc.* v. *Flight Eng'rs Int'l Ass'n,* 306 F.2d 840, 84 (1962); in the second, it rejected a union's Section First claim respecting a carrier's strike insurance plan *Kennedy* v. *Long Island R.R.,* 319 F.2d 366, 370-7

[9] The *Chicago, B. & Q. R.R.* case was settled while an appeal wa pending and the District Court's judgment was ultimately vacate as moot. As to the *Machinists* case, while one of the several unio parties has noted an appeal, presumably it will not urge tha Section 2 First is not justiciable, since none of the unions so con tended in the District Court. Quite to the contrary, they con tended that the railroads, in announcing that they would respon to a "whipsaw strike" by exercising their right to lock-out, wer threatening "a clear violation of . . . Section 2 First of the Rai way Labor Act." 62 CCH Lab. Cas. at ¶ 18,311.

[10] The earliest opinion of the Court of Appeals on the subjec took note of but did not decide the question whether a strike coul be enjoined on grounds of a violation of Section 2 First. *Chicag R.I. & P. R.R.* v. *Switchmen's Union,* 292 F.2d 61, 67 (1961).

(1963); and in the third, where a union had neither resorted to grievance procedures nor served a Section 6 notice, the Court affirmed a strike injunction because the union's conduct "was a flagrant violation under the Act of the 'duty of all carriers, [and] their . . . employees to exert every reasonable effort to make and maintain agreements . . . and to settle all disputes. . . .'" *Long Island R.R.* v. *System Federation,* 368 F.2d 50, 53 (1966) (Elipses by the Court).

The District Courts in the Second Circuit, moreover, have granted either temporary restraining orders or preliminary injunctions against strikes on Section 2 First grounds after exhaustion of the Act's formal procedures in the following cases: *Pan American World Airways, Inc.* v. *Brotherhood of Ry. Clerks,* 185 F. Supp. 350 (E.D.N.Y. 1960); *Long Island R.R.* v. *Brotherhood of R.R. Trainmen,* 185 F. Supp. 356 (E.D.N.Y. 1960); *Chicago, R.I. & P. R.R.* v. *Switchmen's Union,* 187 F. Supp. 581 (W.D.N.Y. 1960), *rev'd on other grounds,* 292 F.2d 61, 67 (2d Cir. 1961); *Pan American World Airways, Inc.* v. *Flight Eng'rs Int'l Ass'n* (unreported) (E.D.N.Y. 1961), *rev'd on other grounds,* 306 F.2d 840 (2d Cir. 1962). See also *American Airlines, Inc.* v. *Air Line Pilots Ass'n,* 169 F. Supp. 777, 787-790, 793, 798 (S.D.N.Y. 1958) (*dictum*); *Kennedy* v. *Long Island R.R.,* 211 F. Supp. 478, 486-488 (S.D.N.Y. 1962), *aff'd,* 319 F.2d 366, 370 (2d Cir. 1963) (*dictum*); *Long Island R.R.* v. *International Bro. of Teamsters,* 57 CCH Lab. Cas. ¶ 12,378 (E.D.N.Y. 1967); *KLM Royal Dutch Airlines* v. *Transport Workers,* 49 CCH Lab. Cas. ¶ 18,990 (E.D.N.Y. 1964) at p. 31,496. In granting relief in *Long Island R.R.* v. *Brotherhood of R.R. Trainmen,* the Court observed with respect to Section 2 First that "[t]o effectuate the purposes of the Act and to prevent a mockery

of its requirements such efforts [to settle] must be reasonable and made in good faith and not simply to satisfy perfunctory compliance." 185 F. Supp. at 358. And in *Pan American World Airways, Inc.* v. *Brotherhood of Ry. Clerks,* the Court responded to the union's argument that " '[t]here is no requirement in the Railway Labor Act that a Union bargain in good faith' " by saying: "To this the Court cannot agree. If compliance with the Act need only be perfunctory, the congressional mandate would be defeated and the purposes of the Act rendered nugatory." 185 F. Supp. at 353. In short, as the Court in *KLM Royal Dutch Airlines* put it: "Good faith effort to resolve disputes and exhaustion of the process is a condition precedent to the use of economic pressures and forces." 49 CCH Lab. Cas. at p. 31,496.

c. In the Fifth Circuit also the justiciability of claims under Section 2 First is clearly established. In *United Industrial Workers* v. *Galveston Wharves,* 400 F.2d 320, 324 (1968), the Court of Appeals observed that the District Court had correctly ordered the carrier to bargain in good faith because "the Act requires that . . . the parties must make every reasonable effort to settle their differences in conference" and because " 'one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties . . . to negotiate' [citing *Elgin, J. & E. Ry.* v. *Burley,* 325 U.S. 711, at 721 n. 12]." In *Richardson* v. *Texas & N.O. R.R.,* 242 F.2d 230, 235 (1957), the Court held a carrier liable for entering into racially discriminatory collective bargaining agreements because Section 2 First "imposed directly upon the Railroads the duty to 'make and maintain agreements' in compliance with the provisions of the Rail-

way Labor Act. . . ." And in *Southern Ry.* v. *Brotherhood of Locomotive Fire. & Eng.*, 223 F. Supp. 296, 308 (M.D. Ga. 1962), *aff'd*, 324 F.2d 503 (1963), the District Court, in an opinion adopted by the Court of Appeals, dismissed a carrier's injunction suit as premature but, citing a number of decisions discussed in this petition, said that "should . . . a strike become imminent" the carrier could seek relief again "if willing to assume the burden of proving that the defendants have not complied with their statutory duty to bargain in good faith." See also *National Airlines, Inc.* v. *International Ass'n of Machinists*, 416 F.2d 998, 1003 n. 3 (5th Cir. 1969).[11]

3. That the weight of authority should be so heavily and uniformly against the decision of the lower court is not surprising, for that decision cannot be reconciled with *Virginian Ry.* v. *System Federation*, 300 U.S. 515 (1937), the authority cited by many of the lower courts in the cases described above and surely one of the most important of this Court's Railway Labor Act decisions. In *Virginian* the plaintiff union, which had won a rep-

---

[11] Three District Court decisions in other circuits are relevant. In *Flight Engineers Int'l Ass'n* v. *Trans World Airlines, Inc.*, 305 F.2d 675 (8th Cir. 1962), the District Court, in an unreported decision subsequently vacated as moot, granted a strike injunction on the basis of a violation by the union of Section 2 First. In *Northwest Airlines, Inc.* v. *Airline Pilots Ass'n, Int'l*, 185 F. Supp. 77, 80 (D. Minn. 1960), the District Court entertained an injunction claim grounded upon an asserted violation of Section 2 First, but found that the carrier did not "discharge . . . its burden of showing an absence of good faith" on the part of the union. And in *Capitol Airways, Inc.* v. *Air Line Pilots Ass'n*, 41 CCH Lab. Cas. ¶ 16,739, at p. 23,837 (M.D. Tenn. 1961), the Court found jurisdiction to issue a declaratory judgment because of Section 2 First, "which imposes upon all carriers and their employees the duty to exert every reasonable effort to make and maintain agreements. . . ."

resentation election conducted under Section 2 Ninth of the Act (45 U.S.C. § 152 Ninth), sought judicial intercession when the carrier continued to deal with a "company union." The union grounded its claim upon several provisions of the Railway Labor Act, including Section 2 Ninth and Section 2 First. The District Court held for the union, entering an injunction which directed the carrier both to "treat with" the union, in the language of Section 2 Ninth, and "to exert every reasonable effort to make and maintain agreements" with the union, in the language of Section 2 First. *Id.*, at 540.

In this Court, the carrier attacked both parts of the injunction on the theory that the statutory provisions upon which they were based were intended by the Congress to be merely precatory. The principal authority advanced in support of this argument was this Court's holding in *Pennsylvania R.R. System Federation* v. *Pennsylvania R.R.*, 267 U.S. 203 (1925), that the forerunner of Section 2 First—Section 301 of the Transportation Act of 1920 (41 Stat. 456, 469)—was "without legal sanction in the Act." 300 U.S. at 544. Beyond that, the carrier urged that the subject matter of the injunction, which involved evaluation of the carrier's good faith, was not suitable for judicial inquiry.[12]

---

[12] In countering these arguments, it is worth noting that the union had the support of the United States, which appeared as *amicus curiae*. Thus, the Solicitor General urged:

> "A review of the history and context of these sections . . . shows that Congress intended the obligations imposed by paragraphs First, Second, and Ninth of § 2, to be both mandatory and enforceable.
>
> "Enforcement of paragraphs First, Second, and Ninth of § 2 is in fact essential to the success of the statutory plan for amicable settlement of disputes through conferences between representatives of the parties. . . ." 300 U.S. at 536.

This is how the Court summarized the carrier's principal argument:

> "But petitioner insists that the statute affords no legal sanction for so much of the decree as directs petitioner to 'treat with' respondent Federation and 'exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise.'" 300 U.S. at 544.

And this is how the Court rejected that argument:

> "The policy of the Transportation Act [of 1920] of encouraging voluntary adjustment of labor disputes, made manifest by those provisions of the Act which clearly contemplated the moral force of public opinion as affording its ultimate sanction, was . . . abandoned by the enactment of the Railway Labor Act. Neither the purposes of the later Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the *Railway Clerks* case [*Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks*, 281 U.S. 548 (1930)] . . . lend support to the contention that its enactments, which are mandatory in form and capable of enforcement by judicial process, were intended to be without legal sanction.
>
> * * * * * *
>
> "The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First." *Id.* at 545, 548 (footnote omitted).

As to the carrier's secondary argument respecting the propriety of judicial relief, the Court summarized the carrier's position in this way:

> "Petitioner contends that . . . negotiation depends on desires and mental attitudes which are beyond judicial control, and that since equity cannot compel the parties to agree, it will not compel them to take the preliminary steps which may result in agreement." *Id.* at 549-550.

And this is how the Court disposed of that contention:

> "Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees." *Id.* at 550.

In the case at bar, as the court below noted, petitioner "place[d] great reliance" upon *Virginian* (CA Op. *infra* p. 18a). But the court below thought that *Virginian* meant only that the parties in negotiating "should be guided by" Section 2 First, not that a refusal to comply with that provision could be remedied by judicial decree. That is so, the court below said, because this Court in *Virginian* "did not state nor imply that whether reasonable effort is in fact complied with by either party was a question for the courts to answer" (CA Op. *infra* pp. 18a-19a).

In this the Court of Appeals erred. This Court in *Virginian* not merely "implied," but explicitly "stated," that compliance by the carrier with its Section 2 First obligation was "a question for the courts to answer." It so "stated" when it wrote that the Act "requires the employer . . . to make reasonable effort to compose differences" and "to enter into a

negotiation for the settlement of labor disputes such as is contemplated by § 2, First," and when it wrote that "whether action taken or omitted is in good faith or reasonable [is an] everyday subject of inquiry by courts in framing and enforcing their decrees." And just as surely this Court "implied" the same thing when it rejected the argument that Section 2 First "affords no legal sanction" for so much of the injunction as required the carrier to "exert every reasonable effort" to settle its disputes with the union.

Even if the *Virginian* opinion were in any way ambiguous with respect to the Section 2 First question, that ambiguity would be erased by this Court's description of *Virginian* in another of its leading Railway Labor Act opinions, *Elgin, J. & E. R.R.* v. *Burley*, 325 U.S. 711, 721-722 n. 12 (1945), *adhered to on rehearing*, 327 U.S. 661 (1946). There, citing *Virginian* as authority for the proposition that Section 2 First is "judicially enforceable," this Court stated:

> "Thus, one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties to a dispute to negotiate for its settlement. See note 26 [quoting Section 2 First and other of the subsections of Section 2]; *Virginian R. Co.* v. *System Federation*, 300 U.S. 515; *cf. Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 300, 320; *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 331, 334. This duty is not merely perfunctory. Good faith exhaustion of the possibility of agreement is required to fulfill it. *Cf. Virginian R. Co.* v. *System Federation, supra*, at 548, 550; *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U.S. 50, 56 ff. . . ."[13]

[13] And, again, on rehearing, the Court in *Burley* said: "We also pointed out that the Act imposes correlative affirmative duties upon the carrier, the collective agent and the aggrieved employee to make every reasonable effort to settle the dispute." 327 U.S. 661, 665 (1946).

All subsequent references in this Court's opinions to *Virginian* and Section 2 First are in accord with *Burley*. See *Brotherhood of Ry. Clerks* v. *Association for the Benefit of Non-Contract Employees,* 380 U.S. 650, 658 (1965) (reaffirming *Virginian's* declaration that the Act requires "a negotiation for the settlement of labor disputes such as is contemplated by § 2, First"); *Order of R.R. Telegraphers* v. *Chicago & N.W. Ry.*, 362 U.S. 330, 339 (1960) (referring to the "Act's command that employees as well as railroads exert every reasonable effort to settle all disputes"); *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 758 (1961) (stating that Section 2 First "created affirmative legal duties on the part of the carriers and their employees"); *Stark* v. *Wickard*, 321 U.S. 288, 303 (1944) (citing *Virginian* as relating to "a right created by statute [which] is mandatory in character and obviously capable of judicial enforcement"); *Steele* v. *Louisville & N. R.R.*, 323 U.S. 192, 207 (1944); *Switchmen's Union* v. *NMB*, 320 U.S. 297, 300-301 (1943); *Tunstall* v. *Brotherhood of Locomotive Fire. & Eng.*, 323 U.S. 210, 213-14 (1944).[14]

---

[14] For commentators' views of *Virginian* and Section 2 First, see Meltzer, "The Chicago & North Western Case: Judicial Workmanship and Collective Bargaining," *1960 Supreme Court Review* 113, 125-126 and note 54 (In *Virginian* "the Court sanctioned the use of an injunction against an unwilling employer to enforce the duty to bargain." The "Court's statement that the Act requires the employer to make 'reasonable effort to compose differences'" is not *dictum*, because "the injunction sustained in *Virginian Railway* required the employer not merely to recognize the union but also to 'exert every reasonable effort to make and maintain agreements.'"); Note, 59 *Mich. L. Rev.* 459, 463 n. 27 (1961) (Section 2 First "is enforceable by order of a federal court," citing *Virginian*); Cox, "The Duty to Bargain in Good Faith," 71 *Harv. L. Rev.* 1401, 1404 (1958) (Section 2 First "is enforceable by a private suit for an injunction," citing *Virginian*); Highsaw, "The

Thus the decision below, in holding that "§ 2, First, does not contemplate judicial enforcement" (CA Op. *infra* p. 13a), is both literally and substantively in conflict with *Virginian's* holding, as summarized in *Burley,* that this provision is "judically enforceable."

4. While the lower court thought distinguishable the decision that is plainly in point, *Virginian,* it thought pertinent a decision that is plainly distinguishable, *General Committee* v. *Missouri-K-T R.R.,* 320 U.S. 323 (1943). That case involved a representational dispute between two unions in which one of them sued to prevent the carrier from dealing with the other with respect to certain issues, claiming that it was the sole representative authorized to negotiate about those issues. The plaintiff union relied on paragraphs First, Second, Fourth, and Ninth of Section 2 of the Act. In holding that the claim was not justiciable, this Court devoted most of its opinion to provisions other than Section 2 First. Its only mention of this provision appears in the following sentence, upon which the lower court in the case at bar relied: "But § 2, Second, like § 2, First, merely states the policy which those other provisions buttress with more particularized commands" (footnote omitted). 320 U.S. at 334.

But by this the Court meant only that the justiciability of the plaintiff's claim arising from a jurisdictional dispute was to be tested by reference to the statutory provision specifically relating to such dis-

---

Need for Re-evaluation of Labor Legislation," "Symposium on Air Transport Labor Relations," 35 *J. Air L. & C.* 313, 450, 455 (1969) (Section 2 First "creates an enforceable obligation in the federal courts . . . It is in essence a requirement of 'good faith' bargaining by the parties."). See also Smith, "The Evolution of the 'Duty to Bargain' Concept in American Law," 39 *Mich L. Rev.* 1065, 1099-1100 (1941).

putes, Section 2 Ninth (45 U.S.C. § 152 Ninth), rather than by reference to Section 2 First. The basis for the Court's holding was its conclusion that the Congress, by enacting Section 2 Ninth and thereby authorizing the National Mediation Board "to resolve a wide range of jurisdictional disputes between unions," evidenced an intent "not to leave their solution to the courts." 320 U.S. at 336. This was so even assuming that some types of jurisdictional disputes would not be within the Board's Section 2 Ninth jurisdiction, because "it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others." *Id.* at 336-37. The legislative purpose reflected in the "more particularized commands" of Section 2 Ninth could not be circumvented by reliance upon the more general provisions of Sections 2 First and 2 Second. Or, as the Court put it with respect to the latter provision, "Nor does § 2, Second make justiciable what otherwise is not." *Id.* at 334. But this does not mean that claims under Section 2 First which do *not* involve representational or jurisdictional disputes are not justiciable. *Virginian* held that they are, for there, as we have indicated, this Court affirmed an injunction commanding obedience to Section 2 First after the plaintiff union's representational dispute had been resolved by the National Mediation Board under Section 2 Ninth. That holding was not diluted by *Missouri-R.-T.*[15]

---

[15] That this is the correct interpretation of *Missouri-K.-T.* is also clear from the passage in *Burley* we have already quoted (*supra* p. 21). There, the Court reaffirmed that *Virginian* established that Section 2 First imposes obligations that are "judicially enforceable," and in that connection simply cited *Missouri-K.-T.* with a "*cf.*" signal. Moreover, in other opinions this Court has explained *Missouri-K.-T.* as a case in which the Act did not de-

5. *Virginian,* moreover, was correctly decided. In view of the office of this petition, we here merely summarize some of the principal relevant factors bearing on the justiciability of Section 2 First. The question, of course, is one of legislative intent. As to that, Section 2 First is written in mandatory, not hortatory, terms, and it is, as this Court has said, the "heart" of the statutory scheme.[16] The presumption is, therefore, that the Congress did not intend that parties should be able to ignore with impunity the bargaining duty established by the statute. Nor is there anything in the nature of that duty beyond the competence of the judicial power. That is established by *Brotherhood of R.R. Trainmen* v. *Toledo, P. & W. R.R.,* 321 U.S. 50 (1944), where this Court held that a railroad had violated a statutory provision—Section 8 of the Norris-LaGuardia Act (29 U.S.C. § 108)—that also obliges parties to a labor dispute to "make every reasonable effort to settle such dispute." Finally, the legislative history of Section 2 First supports the conclusion that it was designed to be judicially enforceable. The thrust of that history is best summarized in the following statement of Mr. Donald Richberg,

---

pend upon judicial enforcement of a statutory command in view of prescribed administrative remedies, in contrast to *Virginian* where there was "no mode of enforcement other than resort to the courts." *Steele* v. *Louisville & N. R.R.,* 323 U.S. 192, 207 (1944); see also *Switchmen's Union* v. *NMB,* 320 U.S. 297, 300 (1943) ("If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control," citing *Virginian*); *Tunstall* v. *Brotherhood of Locomotive Fire. & Eng.,* 323 U.S. 210, 213-214 (1944); *Stark* v. *Wickard,* 321 U.S. 288, 303, n. 17 (1944).

[16] *Brotherhood of R.R. Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369, 377 (1969).

spokesman for the unions, in urging enactment of the statute:

> "In the first place, it is their duty to exert every reasonable effort . . . to settle all disputes, whether arising out of the abrogation of agreements or otherwise, in order to avoid any interruption to commerce. In other words, the legal obligation is imposed, and as I have previously stated, and I want to emphasize it, I believe that the deliberate violation of that legal obligation could be prevented by court compulsion." "Railroad Labor Disputes," *Hearings before House Committee on Interstate and Foreign Commerce on H.R. 7180*, 69th Cong., 1st Sess. (1926), p. 91.[17]

6. Finally, apart from the conflict in decisions respecting the judicial enforceability of Section 2 First, the underlying determination of the lower court that the National Mediation Board has an "adjudicatory or quasi adjudicatory" role which "requires it . . . to enforce compliance with § 2, First" (CA Op. *infra* pp. 16a, 18a) deserves review for the following reasons:

a. There is as to this issue the same conflict among circuits that exists with respect to the intimately related question of the justiciability of Section 2 First. Each of the decisions cited above in which the courts have passed on the merits of Section 2 First claims is incompatible with the holding below that the Board has exclusive jurisdiction over such claims.[18] More-

---

[17] For similar testimony by Mr. Richberg, see *id.*, at 40.

[18] Thus, for example, other Courts of Appeals have invaded what the court below considered to be the exclusive province of the Mediation Board when they held that a union's refusal to designate representatives with full authority to conclude agreements did not violate Section 2 First (*Chicago, R.I. & P. R.R.* v. *Switchmen's Union*, 292 F.2d 61 (2d Cir. 1961)); that a union's refusal to engage in multi-employer bargaining will violate Section 2 First in some disputes but not in others (*Brotherhood of R.R. Trainmen* v. *Atlantic C.L. R.R.*, 383 F.2d 225 (D.C. Cir. 1967)); and that

over, had any of those courts thought that the Board had even coordinate jurisdiction with the courts over Section 2 First claims, traditional principles of primary jurisdiction would doubtless have led them to refrain from adjudication pending a determination by the Board. Instead, it is plain that the common judicial understanding has been, as this Court said just this Term in *Detroit & T.S.L. R.R.* v. *United Transportation Union*, 396 U.S. 142, 158-159 (1969), that "the Mediation Board has no adjudicatory authority with regard to major disputes, nor has it a mandate to issue regulations construing the Act generally." [19]

---

a union's refusal to permit its representatives to bargain over certain matters could violate Section 2 First (*Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n*, 416 F.2d 633 (4th Cir. 1969)). For other similar "good faith bargaining" issues determined by the Courts of Appeals, see *Brotherhood of R.R. Trainmen* v. *Akron & B.B. R.R.*, 385 F.2d 581, 597-98 (D.C. Cir. 1967) (refusing to bargain over valid demands and pressing invalid ones); *Brotherhood of Ry. Clerks* v. *Railroad Ret. Bd.*, 239 F.2d 37, 43-44 (D.C. Cir. 1956) (participating in a "wildcat" strike); *Pan American World Airways, Inc.* v. *Flight Eng'rs Int'l Ass'n*, 306 F.2d 840, 849 (2d Cir. 1962) (refusal to make concessions); *Kennedy* v. *Long Island R.R.*, 319 F.2d 366, 370-371 (2d Cir. 1963) (carriers' adoption of a multi-employer strike insurance plan); *Seaboard World Airlines, Inc.* v. *Transport Workers*, — F.2d —, 62 CCH Lab. Cas. § 10,759 (2d Cir. 1970) (pressing bargaining demands in violation of a contractual moratorium). Questions of whether "action taken or omitted is in good faith or reasonable" are thus "everyday subjects of inquiry by courts," as this Court noted in *Virginian*, 300 U.S. at 550.

[19] See also *Chicago, R.I. & P. R.R.* v. *Switchmen's Union*, 292 F.2d 61, 67 (2d Cir. 1961), where the Court said that Section 2 First issues come to the courts "without the advance administrative screening provided under the National Labor Relations Act," and *Pan American World Airways, Inc.* v. *International Bro. of Teamsters*, 275 F. Supp. 986, 995 (S.D. N.Y. 1967), *aff'd on basis of opinion below sub nom. Brotherhood of Ry. Clerks* v. *Pan American World Airways, Inc.*, 404 F.2d 938 (2d Cir. 1969), where the Court said that "mediation proceedings are designed merely to bring the parties to an agreement" and that "[i]n such mediation the Board performs no adjudicative function . . . ."

b. This judicial understanding of the role of the Board is paralleled by the Board's own view of its authority. So far as we have been able to discover, the Board has never exercised the statutory function that the lower court in the case at bar says it has. We have examined each of the thirty-five annual reports of the Board, as well as its four published summaries of its work. While each of these documents describes the functions of the Board in detail, none of them so much as hints that the Board believes it has the authority or the duty respecting Section 2 First questions attributed to it by the court below. Rather, the Board consistently speaks of its role as confined to informal conciliation and mediation. Thus, for example, in its Sixteenth Annual Report (1950), the Board, in describing the structure of the Act and the character of the Board's responsibilities, said:

> "The National Mediation Board has no enforcement powers but acts purely as a mediatory agency, which means that its representative sits as a friendly officer of the United States Government, armed only with the weapon of friendly counsel and practical assistance in an effort to make collective bargaining successful" (p. 17).[20]

The report on the Mediation Board by the Attorney General's Committee on Administrative Procedure agrees. As the Board observed in its *Seventh Annual* Report (1941) (p. 4), "the Committee remarked that:

> " 'Although the mediation activities of the Board are of very considerable importance in assuring

---

[20] See, also, *e.g.*, *Nineteenth Annual Report* (1953), pp. 22-23; *Twenty-fourth Annual Report* (1958), pp. 5-6; *Twenty-fifth Annual Report* (1959), pp. 4-5; *Twenty-sixth Annual Report* (1960), p. 5; *Twenty-seventh Annual Report* (1961), p. 5.

uninterrupted transportation by rail and air, they do not lend themselves to procedural study. By definition they are of an informal nature, involving negotiation rather than decision.' "

Moreover, in a speech given just last year, a former Chairman of the Board indicated quite clearly that the Board did not pass upon whether the parties were in compliance with Section 2 First and pointed out some of the problems the Board would encounter if it attempted to do so.[21] Finally, that the Board has not attempted to decide Section 2 First questions—and also that it believes that 2 First is judicially enforceable—is confirmed by a brief *amicus curiae* for the United States in *Chicago, R.I. & P.R.R.* v. *Switchmen's Union*, 187 F. Supp. 581 (W.D. N.Y. 1960), *reversed*, 292 F.2d 61 (2d Cir. 1961). There the United States not only argued that Section 2 First was justiciable, but also indicated that the position of the Board was that the practice of the union in that case in submitting negotiated contracts to a referendum of its membership was

---

[21] In that speech, Mr. Howard Gamser, a former member of the Board and Chairman in 1965 and 1968, said that "[s]ome airline spokesmen" had maintained that the Board should not begin mediation until it concluded that the parties had complied with their Section 2 First duties, and that the Board also should not release a case from mediation "if either party has not, in the opinion of the Board, 'made every effort to resolve the dispute . . . .' " That is, those "spokesmen" took the position adopted by the lower court in the case at bar. Mr. Gamser characterized this as advocating a "greater exercise of discretion than heretofore employed" by the Board, questioned whether there is "statutory language to allow the Board to make such a determination," and discussed the procedural steps—such as investigations and hearings—that might have to be employed. "The Role of Mediation in Airline Labor Disputes," "Symposium on Air Transport Labor Relations," 35 *J. Air L. & C.* 313, 505, 510 (1969).

contrary to the requirements of Section 2 First.[22] Had the Board followed the course staked out for it by the opinion of the lower court in the case at bar, it would have decided the Section 2 First question against the union and would not have terminated mediation—thereby foreclosing the union from striking—until the union abandoned the referendum practice.

c. The view of the Board and of the courts outside the Seventh Circuit is supported by both the relevant statutory language and the legislative history of the Act. Nothing in the statutory language gives the Board power to adjudicate whether parties to a "major" dispute are making every reasonable effort to resolve the dispute. The only conceivably relevant provision, Section 5 First (45 U.S.C. § 155 First, *supra* p. 3), simply directs the Board to exercise *its* best efforts to bring about a settlement. It gives the Board no authority at all to decide whether the parties have exercised *their* best efforts or to impose any sanction if it decides they have not. The Board is required to terminate its services when it determines that *its* efforts have failed to produce an agreement, not when it determines that the parties' efforts have (or have not) complied with the Act.

The legislative history of the statute shows that the omission from Section 5 of any grant of adjudicatory authority was deliberate. The Act was drafted jointly by representatives of industry and the unions.[23] Their

---

[22] See Suggestion of the Interest of the United States and a Motion for Leave to File a Brief of Amicus Curiae, printed in Appendix to Brief for Plaintiffs-Appellees, pp. 7-11; Brief of the United States Amicus Curiae in the District Court pp. 2-10.

[23] See *Texas & N.O. R.R.* v. *Brotherhood of Ry. Clerks*, 281 U.S. 548, 563-564 (1930).

principal spokesmen in the hearings were Messrs. Donald R. Richberg for the unions and A. P. Thom for the railroads. We set forth in the margin the many statements by these two witnesses which establish beyond question that, so far as the architects of the bill were concerned, the role of the Board in the mediation prescribed by Sections 5 and 6 of the Act would be restricted to informal and confidential conciliation, and that this role would be undercut if the Board were to "make public reports . . . condemning one party or the other," or if it were to "render any decision" or "to make findings" or to be a "sort of super-labor board." As Mr. Thom summarized the matter, "The board of mediation has no right to make findings; they have only the function of conciliation and persuasion. . . ."[24]

---

[24] Messrs. Richberg and Thom testified as follows in "Railroad Labor Disputes," *Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 7180*, 69th Cong., 1st Sess. (1926), and in "Railway Labor Act," *Hearings before the Senate Committee on Interstate Commerce on S. 2306*, 69th Cong., 1st Sess. (1926):

"... The board of mediation, to preserve its ability to mediate year after year between the parties, must not be given any duties to make public reports condemning one party or the other, even though the board may think one party is wrong. That is the fundamental cause of failure of the Labor Board. . . . The board of mediators should never make any reports to the public condemning one party or the other. Their duty is that of remaining persuaders . . . ." *House Hearings*, at 18 (Richberg).

"Well, in all respects that I can see, they [mediation proceedings] should be regarded as private hearings. They are not private in this sense, that of course if mediation is called for in a situation that is of public interest, the public will know that the mediators are operating in the situation, but there will not be public hearings in the sense that the mediators will not sit behind the table and call witnesses and have

A recent opinion by the Court of Appeals for the District of Columbia Circuit confirms our view that Congress considered that granting adjudicatory power to the Board would compromise its mediatory role. In *International Ass'n of Machinists* v. *NMB*, — F.2d —, 62 CCH Lab. Cas. ¶ 10,621 (D.C. Cir. 1970), the Court, drawing upon the legislative history of the Act, had this to say:

> ". . . It is because the mediator acts as a catalyst for settlement rather than a judge that the

---

the general public present to hear the presentation. In other words, they are trying to settle a controversy, not to make it worse." *House Hearings*, at 89 (Richberg).

". . . The board of mediation attempts to bring them [the parties] to an agreement, first, as to the dispute itself, and if that fails, then an agreement to arbitrate. But the board of mediation does not render any decision." *House Hearings*, at 131 (Thom).

"The board of mediation has no right to make findings; they have only the function of conciliation and persuasion. . . ." *House Hearings*, at 136 (Thom).

". . . It is to be assumed . . . that the board of mediation will act as the old board of mediation used to act, by interviewing the parties, by attempting through conciliatory methods and persuasion to induce them to agree, and failing that effort, to bring about arbitration. But that board is not intended to make any statement to the public if that is what you mean." *Senate Hearings*, at 11 (Thom).

"Now the board of mediation is intended to continue to be regarded by both parties as an impartial body whose services will be valuable, and bring them together. . . . They must continue with their powers of conciliation unimpaired, and they could not do that if they are to render judgment. So that there never was a purpose to make the board of conciliation a fact-finding commission or to have a report on the merits." *Senate Hearings*, at 13 (Thom).

". . . Now you are going to destroy that [mediation] function if you set that board up in this law in such a manner that you appear to be creating another Labor Board, a sort

Supreme Court was minded to say—'The concept of mediation is the antithesis of justiciablity.' *General Committee* v. *M.K.T. R. Co.*, . . . 320 U.S. 323, 337 (1943).

* * * * * *

"The Railway Labor Act of 1926 was drafted by a committee representing railroads and railroad unions. . . . The committee hearings reveal the essential ingredients and underlying philosophy of the proposal expressed by the principal spokesman [sic] for both labor and management. The mediation board is to operate in private conferences, not public sessions. The board will confine itself to the function of conciliation and persuasion, exerting its good offices to bring the parties together. It will not make findings, or even statements to the public, for these would undercut its

---

of super-labor board that will come in and solemnly sit behind a table and summon witnesses and take evidence and consider the matter in private conference, and then issue an unenforceable opinion. Now that is not going to help the situation very much, as has been demonstrated by the Labor Board. When you require men to testify in public you know the care with which they must weigh their words, you know how difficult it is quickly to arrive at all the underlying factors in the controversy. But when men are brought into private conference, when a dispute is investigated informally and the men on both sides can be talked to freely and frankly, that is the reason why Government mediation has been successful in the past, and that is the reason why Government mediation should be successful under this bill and never call for the creation of an emergency board." *Senate Hearings*, at 83-84 (Richberg).

". . . This mediation board does not decide anything except in a single case. It is only intended to exert its good offices to bring the parties together . . . . The mediation board does not [decide anything], except in the single case mentioned [in what is now 45 U.S.C. § 155 Second], where they give an interpretation of an existing agreement after hearing. . . ." *Senate Hearings*, at 157 (Thom).

status as a body recognized by both sides as impartial, and would impair its ability to constitute a significant force for conciliation, not only in the particular case, but in general and in the future. Stressed and restressed was the need to retain the board in a position where it could operate by conciliation and persuasion, and the view that this position would be undercut if it gave statements or opinions, for the party standing condemned by the thrust of such a statement would or at least might conclude that the board was being unfair" (footnote omitted). *Id.*, at pp. 18,042-43.

7. The decision below will have disruptive consequences for both the Board and the parties to collective bargaining under the Railway Labor Act. Where one party believes that the other is not complying with Section 2 First, what is it to do? The question whether the party can secure a judicial decision respecting the issue depends on whether suit is brought in the Seventh Circuit or, say, the District of Columbia Circuit where such claims have been adjudicated several times in the last few years (see *supra* pp. 11-14). Accordingly, the question whether to seek adjudication by the Board will turn in large measure upon the available judicial forum in terms of venue, personal jurisdiction, and a guess as to whether the "race to the courthouse" can be won. And if the party decides to invoke what the court below considers to be the Board's jurisdiction, what is the Board to do? If it follows its past practice, it may be subject to mandamus in the Seventh Circuit but nowhere else. If it abandons that practice and assumes the role of judge, the fear of the Congress that its mediatory role will be undercut may be realized. These jurisdictional problems will unavoidably disturb labor relations in the railroad and airline industries until they are settled by this Court.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

WILLIAM H. DEMPSEY, JR.
DAVID BOOTH BEERS
734 Fifteenth Street, N.W.
Washington, D. C. 20005

RICHARD M. FREEMAN
JAMES P. DALEY
ROBERT SCHMIEGE
400 West Madison Street
Chicago, Illinois 60606

Attorneys for Chicago and North Western Railway Company

Of Counsel:

SHEA AND GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005

APPENDIX

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1969—JANUARY SESSION, 1970

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 18109

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Plaintiff-Appellant,*

v.

UNITED TRANSPORTATION UNION, *Defendant-Appellant.*

No. 18145

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Plaintiff-Appellee,*

v.

UNITED TRANSPORTATION UNION, *Defendant-Appellee.*

MARCH 6, 1970

Before SWYGERT, *Chief Judge,* FAIRCHILD and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* This opinion contains our decision in two appeals. No. 18145 is the appeal of the Chicago and North Western Railway Company (Railway) from the district court's finding that § 2, First,[1] of the

[1] 45 U.S.C. § 152, First, provides:

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Railway Labor Act (45 U.S.C. § 152, First) requiring the parties to exert "every reasonable effort" to settle their disputes was not a requirement which anticipated judicial enforcement. Consequently, since the district court found that it did not have jurisdiction to decide whether § 2, First, was complied with, and all other procedures of the Railway Labor Act having been exhausted, the district court held that the Norris-LaGuardia Act[2] prohibited the enjoining of a threatened strike by the United Transportation Union (Union). The district court, however, granted an injunction against the threatened Union strike pending an appeal of its decision of the justiciability of § 2, First, and the correctness of the court's order granting the injunction pending appeal is the subject of the second appeal, No. 18109, in which the Union is the appellant. We affirm the decision of the district court in both appeals.

The factual basis of the two appeals arose out of a dispute between the United Transportation Union and the Chicago North Western Railway Company over the question of how many brakemen should be employed on the Railway's trains. Such a dispute is commonly known as a crew consist controversy. The dispute was initiated in July of 1965 by service by the Union upon the Railway of notices pursuant to § 6 of the Railway Labor Act (Act)

---

[2] Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) provides in relevant part:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> • • • • •

(45 U.S.C. § 156)[3] requesting a change in agreements to require that not less than two brakemen be employed on every freight and yard crew. In response, the Railway in December of 1965 served notices requesting an agreement that the existing rules respecting minimum crews be rescinded and the matter of crew size be committed to the judgment of management.[4]

---

[3] Section 6 (45 U.S.C. § 156) provides:

> Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

[4] While the historical background of the litigation involved in crew consist controversies is not directly relevant, a brief discussion of the more recent developments in this area may be helpful for a more meaningful grasp of the problems.

The dispute over the number of brakemen to be employed began to be discussed in 1959 when most of the nation's railroads served notices upon various unions under § 6 of the Act proposing rules that would permit, in the discretion of management, the elimination of firemen and reduction in the number of brakemen. The unions countered in 1960 by serving uniform notices proposing a national rule requiring a minimum of two brakemen on every crew.

The issues were joined and negotiated on an industry-wide basis and were not resolved until in the face of a threatened nationwide

By November of 1969, the parties had held conferences pursuant to § 6 (45 U.S.C. § 156);[5] the National Mediation Board had mediated the dispute after invocation of mediation pursuant to § 5 (45 U.S.C. § 155);[6] the Board, pur-

---

strike the Congress enacted a compulsory arbitration statute. (77 Stat. 132).

Under the arbitration prescribed by the Congress in 1963, Arbitration Board No. 282 established a national procedure for resolving the "crew consist" issue over the number of brakemen on train crews. The parties were directed to conduct local negotiations on each carrier, and, in the event of failure of agreement, to conduct local arbitration, all pursuant to national guidelines respecting questions of work burden and safety.

The arbitration award expired in January of 1966. The United Transportation Union served notices upon more than eighty railroads pursuant to § 6, proposing restoration of the crew of one conductor and two brakemen. The railroads responded with a request for an agreement permitting crew reductions beyond those authorized under the award of Arbitration Board No. 282.

[5] See footnote 3, *supra*.

[6] Section 5 First and Second (45 U.S.C. § 155 First and Second) provide:

> First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:
>
> (a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.
>
> (b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.
>
> The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.
>
> In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this

suant to § 5, had concluded that its efforts had been unsuccessful and had proffered arbitration; the Railway had accepted that proffer but the Union declined; the Board thereupon, on October 16, 1969, had terminated its services pursuant to § 5. The President had not appointed an Emergency Board under § 10 (45 U.S.C. § 160),[7] and the

---

title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

[7] 45 U.S.C. § 160 provides:

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the

§ 5 thirty day "cooling off" period respecting maintenance of the status quo had expired.

At the end of November, the Railway instituted a lawsuit in the district court asking the court to declare that the procedures of the Railway Labor Act had not been exhausted and to enjoin the Union from exercising self-help in the form of strike. The Railway alleged that the Union had not discharged all its obligations under the Railway Labor Act in that it had not complied with § 2, First, which imposes upon the parties the "duty to exert every reasonable effort" to settle their disputes. At the same time the Railway filed its complaint it moved for a temporary restraining order which the court granted.

The Railway then presented evidence to show that the Union had violated § 2, First, by not bargaining in good faith. At the conclusion of the Railway's case, the court granted defendant Union's motion to dismiss the complaint and dissolved the temporary restraining order on the basis that:

> § 2, First, . . . is a matter for administrative determination and has been determined by the National Mediation Board under the provisions of Sections 5 and 6 of the Railway Labor Act, 45 U.S.C. 155, 156, is not justiciable and this Court does not have

---

dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

jurisdiction to consider or adjudicate disputes with respect to compliance with such subsection, particularly after the National Mediation Board has relinquished its mediatory jurisdiction of a dispute as in this case.

The district court, however, recognizing that there was case law contrary to its decision, that a strike would result in a mooting of the appeal, and that "such a strike would irreparably injure the plaintiff and the public," granted plaintiff Railway's motion for an injunction pending appeal.

Three days after the district court's decision, the Union filed an emergency motion in this court to vacate the injunction pending appeal. This court issued an order directing that the Union's motion to vacate the injunction pending appeal be taken with the Railway's appeal from the district court's denial of an injunction below. The order also directed that the appeals be expedited. (See *Chicago and North Western Railway Company* v. *United Transportation Union*, No. 18109 unpublished order, 7th Cir. Dec. 19, 1969.)

By ordering that the Union's motion to vacate the injunction pending appeal be taken with the expedited appeal from the district court's denial of a preliminary injunction, we in effect upheld the granting of the injunction pending appeal. Our order of December 19, 1969, in that respect is inconsistent with this court's decision in *Elgin J. & E. Ry. Co.* v. *Brotherhood of Railroad Trainmen*, 302 F. 2d 545 (7th Cir. 1962), which held that if the Norris-LaGuardia Act prohibits the granting of an injunction below it also prohibits the granting of an injunction pending appeal. We are no longer of the opinion that the *Elgin* case is the correct interpretation of the Norris-LaGuardia Act as it applies to injunctions pending appeal and overrule our decision in *Elgin*. While it may be argued that our decision upholding the district court's denial of a preliminary in-

junction because of the non-justiciability of § 2, First, (see pp. 10-16 *infra*) moots the question of whether the district court erred in granting an injunction pending appeal, the necessity of an explanation of our inconsistent action in our December 19, 1969, order maintaining the injunction pending an expedited appeal and the realization that the continued adherence to an incorrect opinion could cause irreparable harm for many years before the case comes before this court in a technically correct posture, persuades us that the question is not moot but should at this time be decided.

We hold that the Norris-LaGuardia Act does not prohibit the district court from granting an injunction pending appeal even though the court determines that Norris-LaGuardia prohibits an injunction below. The power of a district court to grant an injunction to maintain the status quo pending appeal was first codified by the "All Writs Act" contained in the Judiciary Act of 1789, 28 U.S.C. § 1651. In *Scripps-Howard Radio, Inc.* v. *F.C.C.*, 316 U.S. 4 (1942), the Supreme Court in upholding this power stated:

> It has always been held, therefore, that as a part of its traditional equipment for the administration of justice, a federal court can stay enforcement of a judgment pending the outcome of an appeal.
> *Id.* at 9-10.

See also Hovey v. *McDonald*, 109 U.S. 161 (1883). Absent the prohibitions of the Norris-LaGuardia Act, the law is established that even if a district court determines it lacks jurisdiction to grant an injunction pending appeal, it has the power to preserve appellate review of its determination that it lacked jurisdiction. *See United States* v. *Shipp*, 203 U.S. 563, 573 (1906); *see also Peltway* v. *American Cast Iron Pipe Co.*, 411 F. 2d 998, 1002-3 (5th Cir. 1969); *Eastern Greyhound Lines* v. *Fusco*, 310 F. 2d 632, 634 (6th Cir. 1962).

In the instant case as in this court's earlier opinion in the *Elgin* case, the injunction pending appeal was issued pursuant to Rule 62(c) of the Federal Rules of Civil Procedure.[8] The Rule itself is not a jurisdictional grant but merely a codification of a district court's power to maintain the status quo pending appeal. In *Elgin*, the court relied on Rule 82 of the Federal Rules of Civil Procedure[9] which provides that the promulgation of the Federal Rules does not expand the district court's jurisdiction, and Rule 65(e)[10] which provides that the Federal Rules "do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee." The *Elgin* court construed Rules 82 and 65(e) as denying the power of the district court to grant an injunction pending appeal pursuant to 62(c) in cases where the Norris-LaGuardia Act

---

[8] Rule 62(c) of the Federal Rules of Civil Procedure provides in relevant part:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

[9] Rule 82 provides in relevant part:

> These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of acions therein.

[10] Rule 65(e) provides:

> These rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee; or the provisions of Title 28, U.S.C. § 2361, relating to preliminary injunctions in actions of interpleader or in the nature of interpleader; or Title 28, U.S.C. § 2284, relating to actions required by Act of Congress to be heard and determined by a district court of three judges.

prohibited the granting of an injunction in the district court. The *Elgin* court's application of the three Federal Rules of Civil Procedure is correct only if we begin with the premise that Congress by enacting the Norris-LaGuardia Act intended to limit in labor disputes the inherent power of district courts under the "All Writs Act" to grant injunctions pending appeal. If the Congress did not intend such a limitation on the district court's power, Rule 62(c) can be applied without any conflict with the dictates of Rule 82 and Rule 65(e).

There is nothing in the text of the Norris-LaGuardia Act or in the legislative history surrounding the drafting and enactment of the Act indicating a Congressional intent to remove from the district courts their long-recognized power to grant injunctions pending appeal. To remove from the district courts the power to grant injunctions pending appeal and thus the power to maintain the status quo in all cases where the district court has decided that the Norris-LaGuardia Act prohibited an injunction is to in effect make the district court the court of last resort on these matters regardless of the difficulty or novelty of the issues involved. In the absence of any specific Congressional intention to remove the power of district courts to grant injunctions pending appeal, we decline to read into the Act such a serious limitation into the judicial review process.

The United States Supreme Court in *United States* v. *United Mine Workers,* 330 U.S. 258 (1947) supports our decision. The question before the district court in United Mine Workers involved the applicability of the Norris-LaGuardia Act so as to bar the United States from securing an injunction against a strike by United Mine Workers. The district court granted a temporary restraining order which the Union did not obey and the district court found the Union officers to be in contempt. The Supreme Court affirmed the judgment of contempt, finding the Norris-

LaGuardia Act inapplicable. The Court went on to hold, however, that even if Norris-LaGuardia applied, the district court still had the power to preserve the status quo while it decided the underlying jurisdictional issue posed by Norris-LaGuardia:

> In these circumstances, the District Court unquestionably had the power to issue a restraining order for the purposes of preserving existing conditions pending a decision upon its own jurisdiction. 330 U.S. at 290.

While it is true that *United Mine Workers* involved a temporary restraining order and not as the case at bar an injunction pending appeal, both cases deal with difficult questions of jurisdiction. We read the Supreme Court's holding in *United Mine Workers,* that despite the prohibitions of Norris-LaGuardia the district court has inherent injunctive power to grant a temporary restraining order to preserve the status quo while deciding difficult or novel questions determining its own jurisdiction, as support for the proposition that the district court, despite Norris-LaGuardia, also has the inherent power to grant an injunction pending a review of its determination of these jurisdictional issues.

The reasoning of Justice Frankfurter in his concurring opinion in *United Mine Workers* would seem to accept our analysis and its extension to this case. Although Justice Frankfurter was of the opinion that the Norris-LaGuardia Act prohibited permanent injunctive relief in the factual situation, he concurred in the majority's result on the basis that the Norris-LaGuardia Act did not bar interim injunctive relief necessary to preserve the status quo while the court decided the jurisdictional question and while that district court jurisdictional determination was being reviewed by the appellate court:

> To suggest that the right to determine so complicated and novel an issue could not be brought within the

> cognizance of the district court, *and eventually of this court,* is to deny the place of the judiciary in our scheme of government. 330 U.S. at 310 [emphasis supplied].

Although this issue has not been discussed in depth by other courts of appeals, the circuits which have been faced with the problem of district court injunctions pending appeal in a labor dispute have acted consistently with our decision in this appeal. See *Missouri-Kansas-Texas RR. Co.* v. *Brotherhood of Railroad Trainmen,* 342 F. 2d 298 (5th Cir. 1965); *Texas and N.O. RR. Co.* v. *Brotherhood of Railroad Trainmen,* 307 F. 2d 151, 153, 163 (5th Cir. 1962); *Pan-American World Airways* v. *United Brotherhood of Carpenters,* 324 F. 2d 217 (9th Cir. 1963); the district court, though denying a preliminary injunction, granted a 10-day stay to preserve the status quo pending appeal to the Court of Appeals); *Norfolk & P.B.L. RR. Co.* v. *Brotherhood of Railroad Trainmen,* 248 F. 2d 34 (4th Cir. 1957; the district court ordered the temporary injunction dissolved, though by supplemental order, the execution of the court's judgment was suspended pending appeal by the carrier).

While we are cognizant of the purposes of the Norris-LaGuardia Act to remove the injunctive power of the judiciary from the field of labor disputes, we are also mindful of the necessity of judicial review to our legal system. In the absence of a specific Congressional directive, we strike the balance in favor of maintaining the status quo to allow time for a meaningful judicial review.[11, 11a]

---

[11] We also reject the appellant Union's contention that the district court abused its discretion in granting the injunction pending appeal. We find no such abuse. Nor do we find the form of the injunction issued pending appeal improper.

[11a] Since this opinion overrules *Elgin J. & E. Ry. Co.* v. *Brotherhood of Railroad Trainmen,* 302 F. 2d 545 (7th Cir. 1962), we have circulated it to the full active court. No judge has requested a hearing *en banc.*

We now come to the Railroad's appeal in No. 18145 from the decision of the court below that § 2, First, of the Railway Labor Act (45 U.S.C. § 152) is non-justiciable. We are of the opinion that § 2, First, does not contemplate judicial enforcement of its "reasonable effort" requirement and, therefore, affirm the decision of the district court judge.

We construe § 2, First, as a statement of the purpose and policy of the subsequent provisions of the Act and not as a specific requirement anticipating judicial enforcement.

> Nor does § 2 Second make justiciable what otherwise is not. . . . But § 2, Second like § 2, First merely states the policy which those other provisions buttress with more particularized commands. *General Committee of Adjustment of the Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Company*, 320 U.S. 323, 334 (1943).

To imply judicial enforcement to § 2, First, would insert a judicial inquiry into every step of the Railway Labor procedures to determine in each case if reasonable effort is being exerted; this is a role which we believe Congress did not intend the courts play in the settlement of Railway disputes.

In *General Committee* v. *M.-K.-T. RR. Co., supra*, the Supreme Court in deciding certain questions of representation under the Railway Labor Act were not justiciable stated:

> In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this raliway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery

> and involved the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been small, it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. *The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.*
>
> *Id.* at 332-33. [emphasis supplied].

Later in its opinion the Court reiterated:

> [T]he conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else is left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability. *Id.* at 337.

We believe that § 2, First, was intended to play an integral part in facilitating the other more specific procedures of the Railway Act: "The heart of the Railway Labor Act is the duty, imposed by § 2 First upon management and labor. . . ." *Brotherhood of Railroad Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969). However, we find that the role of determining whether "reasonable effort" is being practiced by the parties is not a judicial one but a role which should be left to the National Mediation Board.

Under the procedures of the Act, the National Mediation Board plays the dominant role in major disputes within the framework of the Act. Section 6 of the Act provides:

> [I]n every case . . . where the services of the Mediation Board have been requested by either party or

said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by § 5 of this Act, by the Mediation Board.

Section 5 provides in pertinent part that after the services of the Board are invoked or proffered:

> [S]aid Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.
>
> If arbitration at the request by one or both parties shall be refused, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under § 10 of this Act, no change shall be made in the rates of pay, rules or working conditions or established practices in effect prior to the time the dispute arose.

Thus it can be seen that the Mediation Board plays a pivotal role in the workings of the Act. It maintains the status quo, attempts to bring about a voluntary settlement between the parties, tries to induce the parties to submit to arbitration after a determination that voluntary settlement cannot be reached, and then in effect, if § 10 and the Emergency Board are not appropriate, the Mediation Board after a thirty-day period releases its hold on the status quo.

We believe this integral role of the Mediation Board requires it and not the judiciary to enforce compliance with § 2, First. The Mediation Board is certainly better qualified to determine if the parties are exercising reasonable effort in settling their dispute. If the Mediation Board is of the opinion that one of the parties is not negotiating in good faith, it may simply retain jurisdiction over the mediation process until it believes good faith is being exercised. The Act provides that while the Board retains jurisdiction the parties must maintain the status quo. The Board can refuse to certify that "its mediatory efforts have failed" and thus prevent the exercise of self-help until it is satisfied that its mediatory efforts had a chance to fail, *i.e.*, that the parties were bargaining in good faith. Mediation cannot fail if it never had a chance to succeed.[12]

Instead of involving the federal courts in the determination of whether a reasonable effort had been exercised, after all the procedures of the Act have been completed, it seems much more efficient and sensible to allow the Mediation Board while the Act's procedures are being carried out to determine if a reasonable effort is being exercised by the parties. To allow the Mediation Board rather than the courts to perform this function removes the courts from having to issue injunctions in labor disputes (because § 2, First, had not been complied with), thus avoiding conflict with the dictates and policy of the Norris-LaGuardia Act. In addition, a judicial enforcement of § 2, First, would also require the federal courts to remand the dispute back to a certain stage in the procedures of the Act where one party was not bargaining in good faith. We find no ma-

---

[12] Of course, if one party is not negotiating in good faith as a dilatory tactic to prevent the other party from eventually exercising self-help, the Board can decide to release jurisdiction of the dispute and allow the procedures of the Act to be exhausted in order to allow for self-help.

chinery nor guidelines in the Act which would aid the court in making this difficult determination.

We are mindful that the role of the Mediation Board is basically a non-adjudicatory one, *see e.g., Detroit & Toledo Shore Line Railroad Company* v. *United Transportation Union*, ... U.S. ..... (Dec. 9, 1969, Slip Opinion, page 17). However, we recognize that for the procedures of the Act to be effective, the Mediation Board must accept in certain instances a limited "quasi adjudicatory" posture. Certainly the authority conferred on the Board pursuant to § 2, Ninth [13] (45 U.S.C. § 152, Ninth), to determine the

[13] 45 U.S.C. § 152, Ninth, provides:

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

proper representatives of the employees can be considered adjudicatory or quasi adjudicatory in nature. Similarly, we interpret § 2, First, to confer on the Board pursuant to its express mediatory power, the power, whether it may be considered adjudicatory or quasi adjudicatory, to make sure the parties are exercising every reasonable effort. We do not feel this limited power under § 2, First, will significantly impair the Board's impartial job as a mediator.

We find that the expertise, proximity to the negotiation process and power to maintain the status quo of the Mediation Board make it singularly well suited to implement the Congressional intent and purpose behind the inclusion of § 2, First. While we agree that the procedures of the Act are purposely long and drawn out in order for the parties to reach agreement and prevent invocation of self-help, we are of the opinion that the tacking on of judicial review after a completion of the Act's procedures does nothing but involve courts in intricate factual questions of intent while unreasonably postponing the parties' right to self-help.

The Railway places great reliance that § 2, First, is justiciable upon the Supreme Court's decision in *Virginia Ry.* v. *System Federation,* 300 U.S. 515 (1937). In *Virginia Ry.,* the railroad had refused to engage in collective bargaining with the Federation after the National Mediation Board, acting under § 2, Ninth, of the Railway Act, determined and certified the Federation to be the representative of the shop craft employees for collective bargaining with the railroad. The Supreme Court upheld a district court injunction which required the railroad to recognize and bargain with the Federation despite the railroad's argument that § 2, Ninth, was not justiciable. While the injunction also required the railroad to make every reasonable effort to settle disputes with the Federation thus

in fact invoking the dictates of § 2, First, the opinion did not state nor imply that whether reasonable effort is in fact complied with by either party was a question for the courts to answer. The Supreme Court did not suggest that the district court retain jurisdiction to determine if the parties were negotiating in good faith, nor did it suggest a further judicial proceeding if conferences between the railway company and the Federation failed. Thus while *Virginia Ry.* holds that § 2, Ninth, contemplates judicial enforcement of the requirement to bargain with the Board's accredited employee representative, it does not hold that judicial enforcement is available to determine whether the parties are in fact negotiating in good faith. As we read *Virginia Ry.*, it allows for judicial enforcement of the specific dictates of § 2, Ninth, and simply provides that when the carrier and the employees' representatives are negotiating they should be guided by the other provisions of the Railway Labor Act including § 2, First.

In addition, to *Virginia Ry.*, the railway also relies on a recent decision by the Fourth Circuit in *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n Int'l*, 416 F. 2d 633 (4th Cir. 1969) (petition for cert. filed, 38 U.S. L.W. 3241, Jan. 6, 1970, No. 995), in which the court upheld a district court injunction against a threatened strike. The court in a holding opposite to our conclusions found:

> Restraining the parties from self-help through strikes or otherwise, until they have complied with the duty to bargain in good faith vindicates the Congressional purpose of providing machinery to prevent strikes without creating an irreconcilable conflict with the Norris-LaGuardia Act. *Id.* at 636.

and thus held § 2, First, to be justiciable. We cannot agree with the Fourth Circuit decision. The machinery to prevent strikes which was the Congressional purpose in enact-

ing the Railway Labor Act is contained within the procedures of the Act and not outside it in the injunctive power of the federal courts. We believe that the provisions of the Act and the powers of the National Mediation Board can enforce the duty to bargain in good faith without the need of judicial interference.

AFFIRMED.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Friday, March 6, 1970

Before: HON. LUTHER M. SWYGERT, *Chief Judge*, HON. THOMAS E. FAIRCHILD, *Circuit Judge*, HON. OTTO KERNER, *Circuit Judge*.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 18109, 18145

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, *Plaintiff-Appellee, (Cross-Appellant)*,

v.

UNITED TRANSPORTATION UNION, *Defendant-Appellant, (Cross Appellee)*.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the decision of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that there be no recovery of costs between the parties to these appeals.

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. 69 C 2401

CHICAGO AND NORTH WESTERN RAILWAY COMPANY, a corporation, *Plaintiff*,

v.

UNITED TRANSPORTATION UNION, a voluntary, unincorporated labor association, *Defendant*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on to be heard on plaintiff's verified complaint as amended; defendant's motion to vacate the temporary restraining order; plaintiff's motion for preliminary injunction and defendant's motion to dismiss; the first and second defenses in defendant's verified answer and, the Court having heard the evidence, considered the briefs of the parties and heard the arguments of counsel with respect thereto, and being fully advised in the premises, makes the following findings of fact and conclusions of law:

1) Plaintiff is now and was at all times herein mentioned a corporation, as were and are other railroads with which it has merged and which it controls, and is engaged in the business of transporting persons and property by rail in interstate commerce in the Eastern Division of the Eastern Judicial District of Illinois and elsewhere in the State of Illinois and other states of the United States and is a "carrier" within the meaning of and subject to the Railway Labor Act, 45 USC 151 *et seq.*

2) Defendant is a voluntary, unincorporated labor association, the successor to the Brotherhood of Railroad Trainmen, the Switchmen's Union of North America and

other voluntary, unincorporated labor associations and is, as were its predecessors the "representative" under the Railway Labor Act, *supra,* of employees of plaintiff and the corporations with which it has merged and which it controls, hereinafter "Defendant" and is engaged in business as such "representative" in the Eastern Division of the Northern Judicial District of Illinois and elsewhere in the State of Illinois and other states of the United States.

3) The jurisdiction of the Court is invoked by plaintiff under 45 USC §§ 1331 and 1337 as an action arising under the constitution and laws of the United States in which the amount in controversy exceeds $10,000.00 exclusive of interest and costs and as an action under the Railway Labor Act, 45 USC 151 *et seq.*, an Act of Congress regulating commerce, particularly Section 2 First, 45 USC 152 First, thereof.

4) Plaintiff seeks an injunction against a strike and picketing of plaintiff by defendant over a dispute between plaintiff and defendant with respect to whether plaintiff shall have the unrestricted right to determine number and craft of persons to be employed in crews in trains and yard service or whether a specified minimum number of persons shall be employed in such crews; the ground for plaintiff's action is that defendant has not complied with Section 2 First, of the Railway Labor Act, *supra,* which provides that it shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

5) Defendant denies that Section 2 First of the Railway Labor Act is justiciable and denies that the Court has

jurisdiction under the Norris-LaGuardia Act, 29 USC 101, *et seq.*, particularly Sections 4, 7 and 8 thereof, to issue the injunction sought by plaintiff; the requirements of the Railway Labor Act with respect to the dispute between plaintiff and defendant having been exhausted.

6) In July 1965, defendant served a notice on plaintiff and at about the same time on other railroads, under the provisions of Section 6 of the Railway Labor Act, 45 USC 156 of its desire for a collective agreement with plaintiff to be effective January 25, 1966 at the expiration of the Award of Arbitration Board No. 282 which had been established under and in pursuance of Public Law 88-108, 45 USC 157 (1969 Supp.) for a specified minimum number of persons to be employed by plaintiff in crews in train and yard service.

7. Plaintiff, like other railroads on which defendant served the aforementioned notice, refused to negotiate with defendant with respect thereto on the ground it was not required by the Railway Labor Act to do so because the notices were served during the effective period of the Award of Arbitration Board No. 282. Whereupon, defendant requested the National Mediation Board to assume jurisdiction of the dispute arising from such notice and the National Mediation Board did assume jurisdiction thereof in October 1965.

8. In December 1965 plaintiff, as did other railroads, served a notice on defendant under the provisions of Section 6 of the Railway Labor Act, 45 USC 156 of its desire for a collective agreement with plaintiff for the railroad to have the unrestricted right to determine the number and the craft of persons to be employed in crews in train and yard service and further proposed that such notice be handled concurrently with the notice theretofore served on it by defendant in July 1965 and that, if no agreement should be reached by plaintiff and defendant with respect to such notices, the dispute arising therefrom be further

handled under the Railway Labor Act in conjunction and concurrently with disputes between defendant and other railroads arising from similar notices served at about the same time. Such notice was served and such proposals were made by plaintiff and by other railroads expressly subject to the position that it was not required by the Railway Labor Act to negotiate with defendant with respect to the notice served by defendant on plaintiff in July 1965.

9. In January 1966, plaintiff and defendant met with respect to the notice and proposals served in December 1965 by plaintiff upon defendant. No agreement was made. Defendant refused to negotiate concurrently with plaintiff with respect to the notice served by defendant on plaintiff in July 1965. Defendant further refused to negotiate both of said notices in conjunction each with the other or with disputes between defendant and other railroads arising from similar notices served at about the same time. Plaintiff refused to negotiate with defendant independently of similar disputes between defendant and other railroads.

10. Thereafter plaintiff requested the National Mediation Board to, and it did, assume jurisdiction of plaintiff's dispute with defendant arising from the notice served by plaintiff on defendant in December 1965, as did other railroads, with respect to disputes between them and defendant arising from similar notices served by them on defendant in December 1965.

11. From time to time from January 1966 until June 1969, plaintiff and defendant conferred with respect to the dispute arising from the aforementioned notices served by and upon plaintiff and defendant in 1965 but made no agreement settling the dispute.

12. On October 16, 1969, after a proffer by the National Mediation Board to the parties to submit the dispute arising from their aforementioned notices to arbitration was accepted by plaintiff but declined by defendant, the Na-

tional Mediation Board notified the parties that "it is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement", and terminated its jurisdiction of the aforementioned dispute between plaintiff and defendant effective that date.

13. The President of the United States has not established an emergency board to investigate the dispute between the parties hereto arising from their respective 1965 notices heretofore mentioned.

14. The evidence shows that at all times the defendant has taken the position that the only agreement that could be reached was and is that reached by nearly all of the railroads in the United States with defendant, which requires a restoration of approximately 95% of all of the jobs in question.

15. The court does not find as a matter of fact that either of the parties have been guilty of bad faith in bargaining but finds the question of good faith is delegated to the National Mediation Board and has been resolved and is not an issue before this court.

Conclusions of Law

1. This action arises out of and involves a labor dispute within the meaning of the Norris-LaGuardia Act, 29 USC Section 101, *et seq.*

2. Whether there has been compliance with Section 2 First of the Railway Labor Act, 45 USC 152 First, providing that it shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to com-

merce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof is a matter for administrative determination and has been determined by the National Mediation Board under the provisions of Sections 5 and 6 of the Railway Labor Act, 45 USC 155, 156, is not justiciable and this Court does not have jurisdiction to consider or adjudicate disputes with respect to compliance with such subsection, particularly after the National Mediation Board has relinquished its mediatory jurisdiction of a dispute as in this case.

3. The requirements of the Railway Labor Act having been exhausted for more than thirty days with respect to the dispute between plaintiff and defendant arising from the notices served by defendant on plaintiff in July 1965 and by plaintiff on defendant in December 1965 with respect to the number and craft of persons to be employed by plaintiff in its train and yard crews, the Court did not and does not have jurisdiction under the provisions of Sections 4 and 7 of the Norris-LaGuardia Act, 29 USC 104, 107, to issue an injunction, either temporary or permanent against defendant striking and picketing plaintiff as sought by plaintiff herein.

4. Defendant is entitled to receive from plaintiff recompense for loss, expense or damage sustained by defendant as a result of the issuance of the temporary restraining order on November 19, 1969 including all reasonable costs in the defense of such order and in opposing the injunction sought by plaintiff in this proceeding.

5. Defendant's motion to vacate the temporary restraining order heretofore issued should be denied as the question is moot; plaintiff's motion for preliminary injunction should be denied; defendant's motion to dismiss plaintiff's complaint should be allowed, and an appropriate decree should be entered for such purposes.

FINAL DECREE

This cause coming on to be heard on the verified complaint of the plaintiff filed herein on November 20, 1969 as amended; on plaintiff's motion for a preliminary injunction; on defendant's motion filed November 21, 1969 to vacate the temporary restraining order issued herein on November 19, 1969 which was once extended by an order of the Court and thereafter by agreement of the parties until 6:00 p.m., December 12, 1969 and on plaintiff's motion for a preliminary injunction and defendant's motion to dismiss which are part of defendant's verified answer filed herein on December 2, 1969, and

The Court having heard and considered the testimony and written evidence offered by plaintiff in support of its motion for a preliminary injunction and by defendant in opposition thereto and in support of its motions to vacate the temporary restraining order, and to dismiss the complaint and action on December 2, 3, 4 and 5, 1969 and having heard and considered the briefs submitted by and the arguments of counsel and

The Court having tried the action upon the facts without a jury and having heretofore specially found the facts and separably stated its conclusions of law thereon and having directed the entry of an appropriable [sic] decree, it is

ORDERED, ADJUDGED and DECREED that:

1. Defendant's motion to vacate the temporary restraining order issued November 19, 1969 against a strike by defendant is denied, the question now being moot.

2. Plaintiff's motion for preliminary injunction is denied.

3. The plaintiff shall recompense, and pay to, the defendants herein their loss, expense, or damage caused to the defendants by the issuance of the Temporary Restraining Order herein on November 19, 1969 including all reasonable costs and expense of defense against the order

and against the granting of injunctive relief sought in this proceeding and subsequently denied by this Court. For the purpose of determining the amount thereof, this Court reserves jurisdiction of this cause for this purpose only. Hearing thereon will be set upon motion when time for appeal has passed. If appeal is taken, hearing will be set after final mandate herein.

4. Subject to the jurisdiction reserved in the preceding paragraph, defendant's motion to dismiss the complaint is allowed and the complaint and this action is dismissed at plaintiff's cost.

ENTER:

/s/ J. S. PERRY
United States District Judge

Dated: Chicago, Illinois,
December 11, 1969.